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1st MEDIA LLC

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

1ST MEDIA LLC, Plaintiff, v. NAPSTER, INC., REALNETWORKS, INC., KSOLO, INC. and SLEP-TONE ENTERTAINMENT CORPORATION d/b/a SOUND CHOICE ACCOMPANIMENT TRACKS, Defendants.	Civil Action No. 2:07-cv-00056-LDG-GWF **PLAINTIFF 1ST MEDIA LLC'S APPLICATION FOR ENTRY OF DEFAULT JUDGMENT**

Plaintiff, 1ST MEDIA LLC (hereinafter "1st Media"), by and through its counsel of record, HUTCHISON & STEFFEN, LLC, hereby files its Application for Default Judgment against Defendant, SLEP-TONE ENTERTAINMENT CORPORATION d/b/a SOUND CHOICE

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ACCOPANIMENT TRACKS (hereinafter "Sound Choice"). This Application is made and based upon the papers and pleadings on file herein, the attached Memorandum of Points and Authorities, with its affidavit and exhibits attached thereto, and any arguments of counsel that the Court may entertain at a hearing on this matter.

DATED this 25th day of June, 2007.

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MEMORANDUM OF POINTS AND AUTHORITIES

1. INTRODUCTION

The instant lawsuit is a case of patent infringement. Plaintiff, 1st Media, is the assignee of, owns all rights, title, and interest in, and has standing to sue for infringement of United States Patent 5,464,946, entitled, "System And Apparatus For Interactive Multimedia Entertainment" (hereinafter the "'946 Patent"). *See* Ex. A ¶2, A1. Sound Choice is a North Carolina based company that induces infringement of the '946 Patent in violation of 35 U.S.C. § 271.

Sound Choice is a world leader in the production of karaoke music. As pertains to this action, Sound Choice contracts with a multitude of companies that sell downloadable digital music tracks via the internet for the sole purpose of selling and distributing Sound Choice karaoke content to consumers worldwide. This practice generates significant revenues for Sound Choice and its partners alike.

Sound Choice was duly and properly served with process yet has failed to make any appearance in this action. The Deputy Clerk entered Default on June 12, 2007. *See* Ex. B. It is, thus, appropriate at this time for the Court to also enter a default judgment against Sound Choice. Included with this Application is a detailed calculation of damages, with supporting evidence.

2. LEGAL ARGUMENT

According to Federal Rule of Civil Procedure 55(b)(2), the Court may enter a default judgment on application by the party entitled to judgment by default. FRCP 55(b)(2). If a party against whom the default is sought has appeared in the action, the party must be notified. In this case, however, Sound Choice has not appeared.

In the 9th Circuit, a party's "appearance need not necessarily be a formal one, i.e., one involving a submission or presentation to the court." *In re Roxford Foods*, 12 F.3d 875, 879 (9th Cir. 1993) (quoting *Wilson v. Moore and Assocs., Inc.,* 564 F.2d 366, 368 (9th Cir. 1977)). In fact, "In limited situations, informal contacts between the parties have sufficed [to constitute an appearance] when the party in default has thereby demonstrated a clear purpose to defend the suit." *Id.*

Here, 1st Media attempted to negotiate a settlement with Sound Choice and the parties developed terms that Sound Choice characterized as "a fair compromise." *See* Ex. A ¶3, A2. But Sound Choice ultimately refused to memorialize the agreement. Two months have passed since settlement negotiations ended, and Sound Choice has not indicated its intent to answer and defend.

If necessary, the Court may conduct a hearing to assess the proper amount of damages. FRCP 55(b)(2). Federal Rule of Civil Procedure 55(b)(2) accords the Court discretion to determine whether an evidentiary hearing is necessary, or whether the Court may simply rely on detailed affidavits or documentary evidence. *Time Warner Cable of New York City v. Foote*, 2002 WL 1267993 (E.D.N.Y. 2002) (citing *Auction S.A. v. Marc Rich & Co.*, 951 F.2d 504, 508 (2d Cir. 1991), cert. denied, 503 U.S. 1006 (1992); *Fustok v. Conticommodity Services Inc.*, 873 F.2d 38, 40 (2d Cir. 1989)). "The moving party is entitled to all reasonable inferences from the evidence it offers. *Id.* (citing *Au Bon Pain Corp. v. Artect, Inc.*, 653 F.2d 61, 65 (2d Cir. 1981)).

"[W]hen 'arriving at the judgment amount involves nothing more than arithmetic – the making of computations which may be figured from the record – a default judgment can be entered without a hearing of any kind'." *DirecTV, Inc. v. Griffin*, 290 F.2d 1340, 1343 (N.D. Fla. 2003) (quoting *HMG Property Investors, Inc. v. Parque Industries Rio CaZas, Inc.*, 847 F.2d 908, 919 (1st Cir. 1988) (citing *Polk v. United States*, 323 U.S. 1 (1944)). It is not necessary for the District Court to hold a hearing on default judgment, as long as it has ensured that there was a basis for the damages specified in the default judgment. *Id.* (citing *James v. Flame*, 6 F.3d 307, 309-311 (5th Cir. 1993)).

In this case, the amount of the default judgment is reasonably calculable, as set forth in detail in the Declaration of Dr. Scott Lewis and the attendant documentary evidence. Accordingly, 1st Media requests that the Court enter default judgment against Sound Choice in the amount $404,931. Alternatively, 1st Media is willing to present testimony and evidence on the amount of damages at a hearing on this matter, should the Court deem a hearing necessary.

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3. CALCULATION OF DAMAGES

The calculation of damages in this case is straightforward. Sound Choice is the world's leading provider of digital karaoke music and has numerous contracts, some apparently exclusive, to distribute its karaoke content through numerous online digital music providers. Sound Choice continues to market and sell its karaoke music content via the internet and will continue to induce infringement of the '946 patent for the foreseeable future. Indeed, Sound Choice induces infringement each time a Sound Choice digital audio karaoke track is purchased online and downloaded to a consumer's computer or music playing device.

Two months ago, 1st Media believed it reached an agreement with Sound Choice to resolve this lawsuit. The agreement comprised a staggered royalty fee schedule, from 2.5% to 10%, based on quarterly net sales. *See* Exs. A ¶2 & 3, A2 and A3. Sound Choice expressly characterized this arrangement as "a fair compromise." *See* Ex. A ¶3, A2. Rather than adjusting the royalty percentage based on quarterly earnings, 1st Media proposes a conservative, middle of the road, flat rate of 5% of quarterly net sales. This figure is consistent with the negotiated agreement between the parties.

During settlement negotiations, Sound Choice provided 1st Media with an income statement for the first quarter of 2007. *See* Ex. A ¶5, A4. That statement shows that Sound Choice had net sales of $249,418.64 in that quarter. As indicated from the comparison of net sales over the previous year on the income statement, the Q1 2007 net sales number appears to represent the low end of Sound Choice's expected quarterly sales. *Id.* Therefore, 1st Media proposes that damage calculations be computed based on this quarterly net sales figure.

Once the royalty rate and quarterly net sales numbers are established, the next step is to simply multiply these numbers across the appropriate number of quarters. The priority date for the '946 patent is February 11, 1993. Therefore, the patent is set to expire on February 11, 2013. 35 U.S.C. § 154.

Based on information contained in an email from Sound Choice, they began distributing karaoke content over the internet in late 2004. *See* Ex. A ¶6, A5. 1st Media proposes that damages be calculated starting January 1, 2005 and run through February 11, 2013. This term encompasses 32.47 quarters. Based on a 5% flat royalty rate and quarterly net sales of $249,418.64, damages are calculated at $404,931.

4. CONCLUSION

For the foregoing reasons, 1st Media requests that the Court enter a Default Judgment as to Sound Choice in the amount of $404,931. Should the Court deem it necessary, Plaintiff will appear for a hearing on any of the issues set forth herein.

DATED this 25th day of June, 2007.

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1st MEDIA LLC

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on June 25, 2007, the foregoing **PLAINTIFF 1ST MEDIA LLC'S APPLICATION FOR ENTRY OF DEFAULT JUDGMENT** was filed electronically with the Clerk of the Court using the CM/ECF system and a copy was mailed to the following:

ENTERTAINMENT CORPORATION d/b/a
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